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Docket No.: KCC-16,986

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Appellants: Paul J. DATTA, et al.

Serial No.: 10/010,965

Filing Date: 07 December 2001

Title: PRODUCT SEAL OF DISSIMILAR  
MATERIALS

Confirmation No. 5676

Customer No. 35844

Group No. 3761

Examiner: K. Reichle

**RESPONSE TO NOTIFICATION OF NON-COMPLIANT APPEAL BRIEF**

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

In response to the Notification of Non-Compliant Appeal Brief mailed 01 December 2006, Appellants have revised Sections 4 and 5 on pages 2-3 of the Amended Appeal Brief accompanying this Response to merely address the status of any amendment filed subsequent to final rejection in Section 4 and to more explicitly map each of the independent claims to the specification in Section 5.

I hereby certify that this correspondence (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on

December 26, 2006

12/26/06  
Date

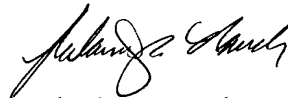
  
Signature

KCC-2102

MR/S

Appellants believe that no fee is due at this time. However, if Appellants are mistaken and a fee is due, please charge any fees related to the Response to Notification of Non-Compliant Appeal Brief to Deposit Account 19-3550.

Respectfully submitted,



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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Applicants: Paul J. DATTA et al.

Serial No.: 10/010,965

Filing Date: 07 December 2001

Title: PRODUCT SEAL OF DISSIMILAR  
MATERIALS

Group No.: 3761

Examiner: Reichle, K.

Customer No.: 35844

**AMENDED APPEAL BRIEF UNDER 37 CFR 41.37**

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

Dear Sir:

Appellants herewith file an amended Appeal Brief in the above identified case, in response to the Notification of Non-Compliant Appeal Brief mailed 01 December 2006.

**I. REAL PARTY IN INTEREST**

The real party in interest is Kimberly-Clark Worldwide, Inc., the assignee of the present application (as recorded at reel 012748, frame 0566).

I hereby certify that this correspondence (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on

December 26, 2006.

12/26/06  
Date

KCC-2102

Andrew J. Rauch  
signature

MMC/I

## **II. RELATED APPEALS AND INTERFERENCES**

Appellants are not aware of any related appeals or interferences with regard to the present application.

## **III. STATUS OF CLAIMS**

The present Appeal is directed to Claims 1-12 and 40-43, as presented in the Claims Appendix, which were finally rejected in the Office Action mailed 19 March 2004. Claims 13-39 were withdrawn from consideration.

## **IV. STATUS OF AMENDMENTS**

No amendments to the claims were filed subsequent to the most recent final rejection.

## **V. SUMMARY OF CLAIMED SUBJECT MATTER**

The present invention is directed to an absorbent article 20 having a product seal of dissimilar materials. The absorbent article 20 includes a front waist region 22, a back waist region 24, and a crotch region 26 extending between the waist regions 22, 24, as shown in Figs. 2-6. (Page 14, lines 1-6.) A first ear panel 106 is formed of a first material extending from a first edge portion of the front waist region 22. A second ear panel 107 is formed of a second material different from the first material and extends from a first edge portion of the back waist region 24, as shown, for example, in Fig. 6. (Page 42, lines 6-16). At least one manually tearable passive bond 70 connects the first ear panel 106 and the second ear panel 107 together. (Page 41, lines 1-14; Fig. 6).

In one embodiment, the second material has a basis weight greater than a basis

weight of the first material. (Page 42, lines 17-19).

In another embodiment, when disconnecting the first ear panel 106 from the second ear panel 107, the first ear panel 106 is damaged more than the second ear panel. (Page 7, lines 6-19; Page 43, line 12 through page 44 line 6; Example 2, pages 45-51).

In a further embodiment, the passive bond 70 can be torn without damaging the second ear panel 107 more the first ear panel 106. (Page 7, lines 6-19; Page 43, line 12 through page 44 line 6; Example 2, pages 45-51).

In yet another embodiment, the first ear panel 106 can be disconnected from the second ear panel 107 without negatively affecting a tensile strength of the second ear panel 107 (Page 7, lines 6-19; Page 43, line 12 through page 44 line 6; Example 2, pages 45-51).

In still another embodiment, the first ear panel 106 can be disconnected from the second ear panel 107 without negatively affecting a tensile strength of the first ear panel 106 (Page 7, lines 6-19; Page 43, line 12 through page 44 line 6; Example 2, pages 45-51).

## **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

The grounds of rejection to be reviewed on appeal are:

1. Claims 1, 8 and 40-43 stand rejected under 35 U.S.C. § 102(b) as being anticipated by, or in the alternative under 35 U.S.C. § 103(a) as being obvious over U.S. Patent 5,622,589 (“Johnson et al.”);
2. Claims 2-7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Johnson et al.; and

3. Claims 9-12 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Johnson et al. in view of U.S. Patent 6,036,805 (“McNichols”), and thus also U.S. Patent 5,226,992 (“Morman”).

## **VII. ARGUMENT**

### **Claims 1, 8 and 40-43 Are Not Anticipated By or Obvious Over Johnson et al.**

In the Office Action mailed 09 March 2005, the Examiner rejected Claims 1, 8 and 40-43 under 35 U.S.C. § 102(b) as being anticipated by, or in the alternative under 35 U.S.C. § 103(a) as being obvious over Johnson et al.

At paragraph 7 of the Office Action, the Examiner writes:

With regard to all the claims, see Figures 3-3A, then see Figures 5-7, then see Figure 4. Also see Figures 1-2 and 8, col. 3, lines 56-60, col. 6, line 16-col. 8, line 44 and col. 9, lines 6-42 (Note col. 7, line 53 and col. 9, line 13, “joining means 205” is incorrect and should be –joining means 300– to be consistent with the remainder of the reference, i.e. the front waist region is 56, the back waist region is 54, the crotch region is 57, the first ear panel is 202 with or without 205 or 200 with or without 205, the second ear panel is 200 without or with 205, respectively, or 202 without or with 205, respectively, and the bond is “joining means”300, see again, e.g., Figures 4 and 5 and col. 7, lines 53-57 (Note a tearable 205 could also be used as 205 in the embodiment of Figure 4 or, alternatively, the ear panels in Figure 5 could be folded as shown in Figure 4, see col. 7, lines 57-59). The material of the ear panels are “different” materials, see again, for example, the Figures, the paragraph bridging cols. 7-8, and col. 7, lines 2-37, i.e. again one of the panels includes 205 and one does not.

The Examiner continues:

With regard to claims 1 and 8, the claim requires the second material having a basis weight greater than the basis weight of the first material. However since one of the ear panels includes element 205 and one does not (note Appellant’s argument in the Appeal Brief that elements 200 and 202 each without 205 are the same), the basis weight of the one ear

panel including element 205 is or obviously is greater than the other ear panel which does not include 205.

With regard to the functions, properties and capabilities of the “passive bond” as defined in the independent claims, see claim language interpretation section supra, i.e. “The portion of the definition of “passive bond”, i.e. “to assist ... article.” supra recites function, capability or property of the “passive bond”.”, the Johnson device includes or obviously includes all the structure of the claims. Therefore there is sufficient factual basis for one to conclude that the functions, properties and capabilities of the claimed structure are inherent in, see MPEP 2112.01, or necessarily and inevitably present in the same structure of Johnson. Especially note Figure 8 which shows tearing of the bond of Johnson increases the size of the waist opening, i.e. would or necessarily and inevitably assist in inspecting or/and removal.

Finally, the Examiner writes:

With regard to the last subsections of claims 40-43, see portions of Johnson et al cited supra, especially the folding in Figures 3-4, col. 7, lines 57-59, the folding and element 205 in Figures 5-7, col. 9, lines 17-24, i.e. the ear panel not including element 205 remains in the same form, i.e. is not damaged or the tensile strength is not negatively affected. The elements 200, 202 have a tensile strength such that 205 will tear before 200, 202 do, see again col. 9, lines 28-30. Also note col. 9, lines 20-24. Therefore, since that one of the ear panels is not damaged or its tensile strength is not negatively affected, such ear panel is affected or damaged less than the other ear panel.

With regard to the last subsection of claim 40, see col. 7, lines 6-12 and col. 6, lines 23-28 and Figures 5-7, i.e. the front one of 200, 202 can be unitary with 205, i.e. front panel/bond torn but rear panel is not.

Claims 1, 8 and 40-43 are not anticipated by or obvious over Johnson et al.

Johnson et al. does not teach or suggest each and every element or limitation of independent Claims 1 and 40-43. Johnson et al. does not teach or suggest: (a) a second ear panel formed of a second material different from the first ear panel material; (b) the second material having a basis weight greater than a basis weight of the first material; and/or (c) at least one manually tearable passive bond connecting the first ear panel and the

second ear panel together, as required by Appellants' claimed invention.

As set forth at Col. 5, lines 22-63, Johnson et al. discloses a method for making a flangeless seam useful in disposable articles. As shown in Fig. 9A, a web 400 having longitudinal side edges 410 is processed into a disposable article 15 having first members 200 and second members 202 which are to be joined. Referring to Figs. 9A-9G, first members 200 and second members 202 are made from the same web 400 and, thus, comprise the same material, unlike the first ear panel and the second ear panel of Appellants' claimed invention.

The Examiner alleges that Johnson et al. discloses at Col. 7, line 60 through Col. 8, line 8, that the first member 200 and the second member 202 are different materials. Appellants respectfully disagree with the Examiner's reading of this paragraph. Johnson et al. discloses that a laminate 220 is formed comprising the second member 202, the proximal portion 210 and the distal portion 212 of the first member 200, and the barrier member 205. Further, Johnson et al. discloses that each material, i.e., the first member 200 and the second member 202, included in laminate 220 can each comprise a single layer material or a laminate material. See Johnson et al. at Col. 7, line 60 through Col. 8, line 8.

Specifically, the Examiner alleges at paragraph 7 of the Office Action that Johnson et al. discloses that the material of the ear panels are "different" materials because "one of the ear panels includes 205 and one does not."

However, first member 200 and second member 202 are made of the same



material regardless of whether barrier member 205 is connected to or integrated with one of first member 200 and second member 202. Referring to Figs. 9A-9G, the method disclosed at Col. 5, lines 22-63 requires that first member 200 and second member 202 are made of the same web 400 and, thus, the same material or laminate. As shown in Fig. 9B, barrier member 205 is placed on web 400 before longitudinal side edge 410 is folded over web 400, as shown in Fig. 9C. Therefore, Johnson et al. does not disclose a first ear panel formed of a first material and a second ear panel formed of a second material different from the first material, as required by Appellants' claimed invention.

The Examiner further alleges that Johnson et al. discloses a second material having a basis weight greater than a basis weight of a first material. The Examiner alleges that since one of the ear panels includes element 205 and one does not, "the basis weight of the one ear panel including element 205 is or obviously is greater than the other ear panel which does not include 205." Johnson et al. does not teach or suggest that first member 200 and second member 202 can have different basis weights, as required by Appellants' claimed invention. In fact, beginning at Col. 5, line 23, Johnson et al. discloses a preferred method of making a flangeless seam wherein a web 400 is provided having longitudinal side edges 410 that will be processed into disposable article 15 having first members 200 and second members 202 to be joined, as shown in Fig. 9A. Thus, Johnson et al. discloses first members 200 and second members 202 made of the same web material 400 and, thus, having the **same** basis weight.

Johnson et al. does not teach or suggest at least one manually tearable

passive bond connecting the first ear panel and the second ear panel together, as required by Appellants' claimed invention. Rather, Johnson et al. teaches using a barrier member 205 positioned between the materials that will tear with less force than is needed to separate the bonds connecting the barrier member to the proximal portion and the distal portion.

Thus, Johnson et al. does not teach or suggest a second ear panel formed of **a second material different from the first material** wherein **the second material has a basis weight greater than a basis weight of the first material**, as required by Appellants' claimed invention. Although Johnson et al. mentions that the materials included in the laminate 220 may comprise single layer materials or laminates, Johnson et al. does not disclose that the second material is different than the first material and does not disclose that the materials may have different basis weights, with the second material having a basis weight greater than a basis weight of the first material. Further, Johnson et al. does not teach at least one **tearable passive bond** connecting the first ear panel and the second ear panel together, as required by Appellants' claimed invention.

The missing subject matter is not inherent or necessarily disclosed in Johnson et al. The Examiner alleges that "[w]ith regard to the functions, properties and capabilities of the 'passive bond' as defined in the independent claims, see claim language interpretation section supra, i.e. 'The portion of the definition of 'passive bond', i.e. 'to assist ... article.' supra recites function, capability or property of the 'passive bond'.'", the Johnson device includes or obviously includes all the structure of the claims. Therefore

there is sufficient factual basis for one to conclude that the functions, properties and capabilities of the claimed structure are inherent in, see MPEP 2112.01, or necessarily and inevitably present in the same structure of Johnson.” Contrary to the Examiner’s assertion, the missing descriptive matter is not necessarily present in the article described in Johnson et al.

To serve as an anticipation when the reference is silent about the asserted inherent characteristic, such gap in the reference may be filled with recourse to extrinsic evidence. Such evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. *In re Oelrich*, 666 F.2d 578, 581, 212 USPQ 323, 326 (CCPA 1981) (quoting *Hansgird v. Kemmer*, 102 F.2d 212, 214, 40 USPQ 665, 667 (CCPA 1939)) provides: Inherency, however may not be established by probabilities or possibilities. The mere fact that a certain thing *may* result from a given set of circumstances is not sufficient. *Continental Can Co. USA, Inc. v. Monsanto Co.*, 948 F.2d 1262, 20 USPQ 1746, 1749-50 (Fed. Cir. 1991).

Thus, the missing element or function must necessarily result from Johnson et al.

Johnson et al. merely discloses a method for making a flangeless seam useful in disposable articles. As discussed above, the Johnson et al. method includes processing a web having longitudinal side edges into a disposable article having joined first members and second members made from the same web and, thus, comprising the same material. Therefore, the missing elements, namely, a second ear panel formed of a second material different from the first ear panel material; a second material having a basis weight greater than a basis weight of the first material; and at least one manually tearable passive bond connecting the first ear panel and the second ear panel together, do not necessarily

result from Johnson et al.

As stated by the Federal Circuit:

For a prior art reference to anticipate a claim, the reference must disclose each and every element of the claim with sufficient clarity to prove its existence in the prior art. ... Although this disclosure requirement presupposes the knowledge of one skilled in the art of the claimed invention, that presumed knowledge does not grant a license to read into the prior art reference teachings that are not there. *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 43 USPQ 2d 1481, 1490 (Fed. Cir. 1997).

Johnson et al. does not disclose each and every element or limitation of independent Claims 1, 40, 41, 42 and/or 43, as required for a reference to anticipate a claim under 35 U.S.C. § 102. Further, Johnson et al. does not render Appellants' claimed invention obvious as required by 35 U.S.C. § 103.

Accordingly, Appellants respectfully urge that Claims 1, 8 and 40-43 are not anticipated by or obvious over Johnson et al. Appellants respectfully request reversal of the rejection of Claims 1, 8 and 40-43 under 35 U.S.C. § 102(b) as being anticipated by, or in the alternative under 35 U.S.C. § 103(a) as being obvious over Johnson et al.

**Claims 2-7 Are Patentable Over Johnson et al.**

In the Office Action mailed 09 March 2005, the Examiner rejected Claims 2-7 under 35 U.S.C. § 103(a) as being unpatentable over Johnson et al.

Claims 2-7 depend from and further limit independent Claim 1, which Appellants believe is patentable for at least the reasons presented above.

The Examiner alleges that, “[w]hile the criticality of different basis weights of first and second materials of front and rear ears passively bonded to each other directly

to form side seams is disclosed, the criticality of specific basis weights and tensile strengths has not been disclosed.” The Examiner contends that “the general conditions of the claims are taught by the prior art, i.e. materials of different basis weights forming panels bonded together.” Therefore, the Examiner alleges that since the general conditions are disclosed by the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.

As discussed above, Johnson et al. fails to teach or suggest “the general conditions of the claims,” as alleged by the Examiner. Johnson et al. does not teach or suggest: (a) a second ear panel *formed of a second material different from the first material*; (b) the second material having *a basis weight greater than a basis weight of the first material*; and/or (c) at least one manually tearable *passive bond connecting the first ear panel and the second ear panel together*, as required by independent Claim 1. Thus, Johnson et al. does not teach or suggest the basis weight limitations of Claims 2-6. Further, Johnson et al. does not teach or suggest a peak load tensile strength of about 8.5 lbs. to about 100 lbs., as required by Claim 7.

Accordingly, Appellants respectfully urge that Johnson et al. does not render Appellants’ claimed invention obvious in the manner required by 35 U.S.C. § 103(a). Appellants respectfully request reversal of the rejection of Claims 2-7 under 35 U.S.C. § 103(a) as being unpatentable over Johnson et al.

**Claims 9-12 Are Patentable Over Johnson et al. In View Of McNichols And Thus Also Morman**

In the Office Action mailed 09 March 2005, the Examiner rejected Claims 9-12 under 35 U.S.C. § 103(a) as being unpatentable over Johnson et al. in view of McNichols and thus also Morman.

Claims 9-12 depend from and further limit independent Claim 1, which Appellants believe is patentable for at least the reasons presented above.

The Examiner alleges that Johnson et al. teaches “readily tearable side bonds and that the ear panels can be any material known in the art that is suitable for use in disposable articles which may be joined together by a seam,” without any citation to Johnson et al. However, as discussed above, Johnson et al. fails to teach or suggest “the general conditions of the claims,” as alleged by the Examiner. Johnson et al. does not teach or suggest: (a) a second ear panel *formed of a second material different from the first material*; (b) the second material having *a basis weight greater than a basis weight of the first material*; and/or (c) at least one manually tearable *passive bond connecting the first ear panel and the second ear panel together*, as required by independent Claim 1. Because Johnson et al. does not teach or suggest a first material and a different second material, as required by Appellants’ claimed invention, one having ordinary skill in the art would not be motivated to employ the materials and peel strengths as taught by McNichols on the Johnson et al. article, as alleged by the Examiner.

Alternatively, the deficiencies of Johnson et al. are not overcome by McNichols. McNichols teaches a method of providing disposable absorbent articles by

first providing a continuously moving web of outer cover material and then intermittently connecting additional components to the continuously moving web of outer cover material. For example, a pair of laterally opposed side panels 28 can be attached to one of the waist regions 22 and 24 of each diaper 20 on the continuously moving web of interconnected diapers 80.

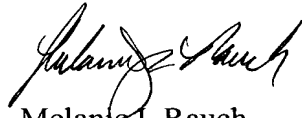
However, McNichols does not teach or suggest *a second ear panel formed of a second material different from the first material*, or that the second material has *a basis weight greater than a basis weight of the first material*, as required by independent Claim 1. Further, McNichols does not teach or suggest *at least one manually tearable passive bond connecting the first ear panel and the second ear panel together*, as required by independent Claim 1.

Accordingly, Appellants respectfully urge that Johnson et al. in view of McNichols and thus Morman does not render Appellants' claimed invention obvious in the manner required by 35 U.S.C. § 103(a). Appellants respectfully request reversal of the rejection of Claims 9-12 under 35 U.S.C. § 103(a) as being unpatentable over Johnson et al. in view of McNichols and thus Morman.

### VIII. CONCLUSION

For the foregoing reasons, Appellants respectfully request the Board to reverse the rejections of: Claims 1, 8 and 40-43 under 35 U.S.C. § 102(b) as anticipated by U.S. Patent 5,622,589 ("Johnson et al."); Claims 2-7 under 35 U.S.C. § 103(a) as unpatentable over Johnson et al.; and Claims 9-12 under 35 U.S.C. § 103(a) as unpatentable over Johnson et al. in view of U.S. Patent 6,036,805 ("McNichols"), and thus also U.S. Patent 5,226,992 ("Morman").

Respectfully submitted,



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### CLAIMS APPENDIX

1. An absorbent article comprising:  
a front waist region, a back waist region, and a crotch region extending between the waist regions,  
a first ear panel formed of a first material extending from a first edge portion of the front waist region;  
a second ear panel formed of a second material different from the first material extending from a first edge portion of the back waist region, the second material having a basis weight greater than a basis weight of the first material; and  
at least one manually tearable passive bond connecting the first ear panel and the second ear panel together.
2. The absorbent article of Claim 1 wherein the second material has a basis weight of at least about 20 gsm.
3. The absorbent article of Claim 1 wherein the first material has a basis weight of less than about 20 gsm.
4. The absorbent article of Claim 1 wherein the second material has a basis weight of at least about 30 gsm.
5. The absorbent article of Claim 1 wherein the first material and the second

material each has a basis weight of at least about 20 gsm.

6. The absorbent article of Claim 1 wherein the first material and the second material each has a basis weight of about 30 gsm to about 60 gsm.

7. The absorbent article of Claim 1 wherein the second material has a peak load grab tensile strength of about 8.5 lbs. to about 100 lbs.

8. The absorbent article of Claim 1 wherein the first ear panel is passively bonded to the second ear panel by one of sonic welding, adhesive bonding, thermal bonding and combinations thereof.

9. The absorbent article of claim 1 wherein the first material comprises a point bonded nonwoven material.

10. The absorbent article of claim 1 wherein the second material comprises a laminate having at least one film layer positioned between two layers of polypropylene spunbond material.

11. The absorbent article of claim 1 wherein each passive bond has a peel strength of less than about 5000 grams.

12. The absorbent article of claim 1 wherein each passive bond has a peel strength of about 1500 grams to about 3000 grams.

40. An absorbent article comprising:  
a front waist region, a back waist region, and a crotch region extending between the waist regions,  
a first ear panel formed of a first material extending from a first edge portion of the front waist region;  
a second ear panel formed of a second material different from the first material extending from a first edge portion of the back waist region; and  
at least one manually tearable passive bond connecting the first ear panel and the second ear panel together,  
wherein in disconnecting the first ear panel from the second ear panel, the first ear panel is damaged more than the second ear panel.

41. An absorbent article comprising:

- a front waist region, a back waist region, and a crotch region extending between the waist regions,
- a first ear panel formed of a first material extending from a first edge portion of the front waist region;
- a second ear panel formed of a second material different from the first material extending from a first edge portion of the back waist region; and
- at least one manually tearable passive bond connecting the first ear panel and the second ear panel together,

wherein the passive bond can be torn without damaging the second ear panel more than the first ear panel.

42. An absorbent article comprising:

- a front waist region, a back waist region, and a crotch region extending between the waist regions,
- a first ear panel formed of a first material extending from a first edge portion of the front waist region;
- a second ear panel formed of a second material different from the first material extending from a first edge portion of the back waist region; and
- at least one manually tearable passive bond connecting the first ear panel and the second ear panel together,

wherein the first ear panel can be disconnected from the second ear panel without negatively affecting a tensile strength of the second ear panel.

43. An absorbent article comprising:

a front waist region, a back waist region, and a crotch region extending between the waist regions,

a first ear panel formed of a first material extending from a first edge portion of the front waist region;

a second ear panel formed of a second material different from the first material extending from a first edge portion of the back waist region; and

at least one manually tearable passive bond connecting the first ear panel and the second ear panel together,

wherein the first ear panel can be disconnected from the second ear panel without negatively affecting a tensile strength of the first ear panel.

**EVIDENCE APPENDIX**

None

**RELATED PROCEEDINGS APPENDIX**

None